IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 1021 OF 1998

IN

Summons for Judgment No. 29 of 1997

in

SUMMARY SUIT NO. 3155 OF 1996

Serifinance & Investment Co. Pvt. Ltd.
having its registred ofice at 5/26,
Tardeo Air-conditioned Market
building, Tardeo Main Road,
Mumbai 400 034. ... Appellant

vs.

Videocon Leasing & Industrial
Finance Ltd., a registered limited
company, having its Head Ofice at 171-C,
Mittal Court, Nariman Point,
Mumbai 400 021. . .... Respondent

Mr. Hiralal Thakkar Sr. Counsel with M.K. Nesari for appellant

MR. K.R. Bulchandani for respondent

CORAM: R.M.S. KHANDEPARKAR

AND

D. G. KARNIK JJ.

RESERVED ON : 14th March, 2007

PRONOUNCED ON: 11th April,2007

JUDGMENT: (Per KARNIK J.)

1. This appeal is directed against an order dated 22nd June 1998 passed by a learned Single Judge in the Summary Suit No. 3155 of 1996 granting conditional leave to the appellant to defend the suit.

2. The appellant, who is the defendant in the Summary Suit No. 3155 of 1996, and the defendant in the Summary Suit No. 3423 of 1996 (for short 'the other summary suit')are both private limited companies under the common management and appear to be known in the market as sister concerns. The respondent had lent to the appellant a sum of Rs.4 crores as an inter corporate deposit. The respondent had also lent to the appellant' ssister concern, who is the defendant in the other suit, Rs.3 crores by way of inter corporate deposit. Part of the loans taken by the appellant as well the appellant' **s**ister concern by way of inter corporate deposits were returned. For the recovery of the alleged balances due of the said inter corporate deposits with interest, the respondent filed two separate suits, one bearing

Summary Suit No. 3155 of 1996 against the appellant and the other bearing Summary Suit No. 3423 of 1996 against the sister concern of the appellant. In the Summary Suit No. 3155 of 1996, from the order in which the present appeal arises, the respondent claimed from the appellant a sum of Rs.1,56,35,616/- and took out a summons for judgment against the appellant. The appellant opposed the summons for judgment and applied for a leave to defend. By the order dated 22nd June 1998 the learned Single Judge granted leave to defend conditional upon the appellant depositing in the court a sum of Rs.70,00,000/- within 15 weeks. That order is impugned in this appeal.

3. The learned Single Judge heard the summonses for judgment taken out by the respondent in both the suits together and passed a common order in both the suits. It appears that it was the contention of the respondent, who was the plaintiff in both the suits, that certain sums of money which were paid by the appellant herein were adjusted towards the dues of the appellant ' sister concern. In view of the said adjustment no amount remained due from the appellant 's sister concern

– the defendant in the other summary suit. In view of the same the appellant also sought leave to withdraw the other summary suit filed against the appellant' **s**ister concern.

4. Before the learned Single Judge the appellant contended that the respondent had no authority to appropriate the payment made by it towards the alleged dues of its sister concern. The appellant had not given any authority to the respondent to appropriate the payment made by it for the dues of the other company, even though it was its sister concern. According to the appellant a company incorporated under the Companies Act is a separate legal entity, distinct from its members. The appellant company and its sister concern, in law, were two different concerns having separate legal personalities. Therefore the payments made by the appellant could not be appropriated and adjusted towards the dues of another legal person. If the payments made by the appellant are accounted in appellant 's own account no amount was due by the appellant to the respondent. The appellant was therefore entitled to an unconditional leave to defend.

5. After considering the material available before him the

learned Single Judge came to the conclusion that the appellant its sister concern were separate legal entities, and maintained separate accounts. He also came to the conclusion that in the circumstances the defence of the appellant that the payment made by it could not be appropriated in the account of its sister concern raised a triable issue. He however held that though it was a triable issue, it was not a bona fide defence. The learned Single Judge held that in any event money (about Rs.70,00,000/-) would be due either by the appellant or by its sister concern to the respondent. The learned Single Judge therefore granted conditional leave to the appellant to defend the suit, subject to deposit of Rs.70,00,000.

6. Mr. Thakkar, Sr. Counsel appearing for the appellant, submitted that having recorded a finding of fact that the appellant had a defence which gave rise to a triable issue, the learned Single Judge ought to have granted unconditional leave to the appellant to defend the suit. The question of bona fides or otherwise of the appellant were irrelevant if a triable issue otherwise was raised, submitted the counsel.

Mr. Thakkar referred to and relied upon the decision of the Supreme Court in M/s. Mechalec Engineers & Manufacturers vs. M/s. Basic Equipment Corporation, reported in AIR 1977 SC 577 . In para 8 of the decision the Supreme Court has laid down the proposition for grant of leave in the following words:

> "(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.
>
> (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
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> (c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to

establish a defence to the plaintiff ' sclaim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.."

7. In para (b) it has been specifically laid that if the defendant

raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a adversely good defence he is entitled to an unconditional leave to defend. Once a reasonable defence is made out the defendant is entitled to an unconditional leave.

8. We have examined the defence of the appellant. The appellant had made the payments to the respondent, some of which have been adjusted towards the dues of another legal person. Whether the appellant had given instructions to appropriate part of the payment for the dues of its sister concern or not raises a triable issue. Prima facie there is nothing placed on record to show that appellant had ever authorised the respondent to appropriate payment towards the dues of the sister concern. The appellant is a company and the defendant in the other summary suit is a separate company which are two legal entities in the eye of law. In the circumstances, the question whether the respondent was right in appropriating any payment made by the appellant towards the dues of appellant ' **s**ister concern raises a triable issue. In this view of the matter we are of the view that the

appellant is entitled to unconditional leave to defend. For these reasons the impugned judgment and order is set aside and the appellant is granted unconditional leave to defend the suit. The appellant shall file the written statement within 8 weeks. The suit shall thereupon stand transferred to the list of commercial causes. The appeal is accordingly allowed in above terms with no order as to costs.

(R.M.S. KHANDEPARKAR J.)

(D. G. KARNIK J)